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In The
Supreme Court of The United States

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and on Application for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether the lower court correctly determined that Penry's mitigating evidence was within the jury's effective reach under the special issues and jury instructions submitted at the punishment phase of trial.**

2. **Whether the lower court correctly determined that a defense-requested, court-ordered psychiatric evaluation could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of trial.**

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, respondent herein, by and through the Attorney General of Texas, and files this brief in opposition.[1] Penry, in custody pursuant to a presumptively valid capital murder conviction and sentence of death and currently scheduled for execution on November 16, 2000, asks the Court to review the opinion of the United States Court of Appeals for the Fifth Circuit denying his application for a certificate of appealability ("COA") from the judgment of the district court denying his petition for federal writ of habeas corpus.

[1] For clarity, the petitioner will be referred to as "Penry" and the respondent as "the Director."

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Penry's COA is attached to the petition as Appendix A. *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000).

JURISDICTION

Penry seeks to invoke the jurisdiction of the Court to review the circuit court's denial of a COA under the provisions of 28 U.S.C. §1254(1). *See Hohn v. United States*, 118 S. Ct. 1969 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

Penry bases his claims upon the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In November 1979, Penry was charged by an indictment filed in the 258th Judicial District Court of Polk County, Texas, with the capital offense of intentional murder of Pamela Carpenter during the course of committing an aggravated rape. 1 Tr 1.[2] Venue was transferred to Trinity County, where, following a competency hearing, Penry was convicted of capital murder and sentenced to death. Penry's conviction and sentence were affirmed on

[2] "Tr" refers to the documents filed in the underlying cause, or transcript, preceded by volume number and followed by page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial.

direct appeal, and this Court denied certiorari review. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986). State habeas relief was denied in 1986. *Ex parte Penry*, No. 15,918-01. Federal habeas relief was denied by the United States District Court for the Eastern District of Texas, Lufkin Division, on April 28, 1987. *Penry v. McCotter*, No. L-86-89-CA. The lower court affirmed on November 25, 1987. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987). This Court, however, reversed, holding that Penry's rights were violated by the jury instructions submitted at the punishment phase of his trial. *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

On retrial, venue was transferred to Walker County. 1 Tr 96. Following a second competency hearing, Penry was tried before a jury on his plea of not guilty. 1 Tr 103, 199-200. On July 9, 1990, the jury found Penry guilty of the capital offense. 4 Tr 1005. On July 17, 1990, after a separate punishment hearing, the jury answered affirmatively the three special issues submitted pursuant to former article 37.071(b) of the Texas Code of Criminal Procedure. 5 Tr 1330-32. In accordance with state law, the trial court assessed punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on February 22, 1995, and this Court denied certiorari review on November 13, 1995. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977 (1995). Penry's application for state habeas relief was denied by the Court of Criminal Appeals, after an evidentiary hearing, on December 3, 1997. *Ex parte Penry*, No. 15,918-02. On March 2, 1998, Penry filed a petition for federal habeas relief in the United States District Court for the Southern District of Texas, Houston Division. By orders entered on March 30, 1999, the district court denied relief and COA. *Penry v. Johnson*, No. H-97-4094 (S.D. Tex.). The

lower court denied COA on June 20, 2000, and denied rehearing on July 25, 2000. *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000). The instant petition for writ of certiorari followed.

B. Statement of Facts

1. Guilt-Innocence Phase

On the morning of October 25, 1979, Pamela Carpenter telephoned a close friend for help, managing to say that she had been raped and stabbed. 42 SR 130-32. When the first officer arrived on the scene, Carpenter gave a description of her attacker as being a white male, slender, and short with short black curly hair cut up over the ears. 42 SR 173-74. Carpenter was taken to a hospital and gave the same description of the assailant before she died, again noting that she had been raped. 42 SR 205-06; 43 SR 262. She stated that she had seen the attacker in the area but did not know him personally and that he had "used scissors on me." 43 SR 264, 278.

Later that same day, Penry was found to have two fresh small puncture wounds close together on his back, 42 SR 209-210, which were consistent with being stabbed by scissors which were found at the scene. 44 SR 515-17, 520, 643-44. Further, Penry was short and thin, with curly black hair cut above the ears. 42 SR 214-16; 43 SR 314. Penry initially stated that his back injury occurred when he fell off of his bicycle that morning and landed on a stick. 43 SR 294. After being given his warnings and stating that he understood them, Penry consented to obtaining the shirt he had been wearing earlier, 43 SR 296, 299, 323-25, and then accompanied officers to the crime scene, where he remained unguarded in a patrol car with a door open. 43 SR 300-02. After about forty-five minutes, Penry called an officer over and stated, despite being told to be quiet, "I want to get it off my conscience, I done it." 43 SR 303-04. After going inside the house and explaining what had happened in detail,

Penry was taken back to the police department and read his warnings by a justice of the peace. 43 SR 306, 351-52, 385. However, before he could sign them, Penry's father arrived and read the warnings to Penry again. 43 SR 353, 386. At that time, Penry again admitted that he had done it. 43 SR 357. Several officers present testified that they had had conversations with Penry in the past and had no reason to suspect his mental capacity. 43 SR 315, 366-67, 419.

Penry's oral confession was written down by an officer who then had his notes transcribed and read back to Penry. Two non-law-enforcement witnesses were called in, and the statement was read to him again, including the standard warnings. Penry said he understood the warnings and initialed them, answered questions about the crime by one of the civilian witnesses, even demonstrating his injuries, and then signed the statement. 43 SR 394-96, 446-49.[3]

The next day, another officer (who had not seen the first statement or been involved in the investigation) talked to Penry, and again read him his rights. After telling Penry that he could stop him at any time for a further explanation of his rights, the officer explained them individually at length. The officer then had Penry explain the rights back to him. He then took Penry's statement down, reading each sentence back to Penry as he typed it. Again, civilian witnesses were called in, the statement (including the warnings at the beginning) was read to Penry, and he signed it. 44 SR 544-51, 558-62, 609.

The prior testimony of the deceased medical examiner was read to the jury. He

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[3] In the statement, Penry noted that he met the victim when he helped install a stove and a freezer at her house about three weeks earlier. 43 SR 401. This was confirmed by his temporary employer, who also noted that he did not feel that Penry was retarded. 43 SR 457-58, 470.

testified that the victim had a bruise near one eye, a bruise on her hip, and bruising on the neck which was consistent with strangling. He also found a bruise on her chest in the shape of a shoe heel which caused one of her kidneys to rupture. Finally, he found a stab wound to the chest which went into the lung and was consistent with having been caused by scissors. SX 82 at 2073-79, 2087-92.

The defense presented documentary evidence from Penry's youth indicating full scale IQ scores of between 51 and 60, indicating that Penry had been eager to please when taking his IQ tests, and indicating brain damage and a moderate to severe perceptual-motor problem. 45 SR 678-692. In response, the State presented the testimony of a psychiatrist, Dr. Fred Fason. Dr. Fason testified that Penry did not have a significant degree of brain damage, that he was between mildly mentally retarded and dull normal (having scored over 70 on both the verbal and the performance portions of different intelligence tests), and that he had an antisocial personality disorder, which, combined with very little formal education, could explain his low IQ test scores. 46 SR 796-802, 809, 813.

2. Punishment Phase

At the punishment phase of trial, the State introduced extensive evidence of Penry's criminal record and violent conduct, both in and out of prison.

In January 1982, Gregory Dennis, a guard at the Ellis I prison unit, found Penry trying to beat another inmate with a broom handle that had been made into a weapon. When Dennis returned Penry to his cell, Penry pulled out a "shank," comprised of a melted toothbrush containing a razor blade, which Dennis ultimately convinced Penry to turn over. 47 SR 953-55. Penry then asked Dennis to let him out of his cell so he could go "settle the matter." 47 SR 957.

Similarly, Ellis I guard Wallace Selman observed a confrontation between Penry and an inmate in June 1983. Penry brandished a board that had been broken into a makeshift pointed weapon and tried to jab it into the next cell, where the other inmate was located. When Selman tried to persuade Penry to turn over the board, Penry refused, saying, "I am going to get that motherfucker and when he comes by here, he has got to come out of his house, and when he does, I am going to get him." 47 SR 974-76.

Finally, Ellis I guard and eventual assistant warden Sanders Estes testified that he came to know Penry over a period of several years. On May 23, 1981, Penry was causing a disturbance in his cell and had made a homemade weapon by breaking off part of the shelf in his cell. Estes had to call for assistance and then physically took the board away from him. Penry then reached into his pocket, and Estes tackled him before he could pull out a "shank" fashioned from a razor blade melted into a toothbrush handle. 47 SR 1150-53.

In addition, prison employees testified that Penry was an aggressive inmate and had a bad reputation on Ellis I for being dangerous and assaultive. 47 SR 962-63 (Michael Grant), 981-83 (Selman), 1006-08 (Tim Keith), 1156 (Estes).

These prison guards also provided their observations of Penry's mental abilities. For instance, Selman testified that he never had any trouble communicating with Penry during the two and one-half years he had interactions with Penry. Notably, when on restriction, Penry would try to bargain with Selman to reduce the period of restriction in exchange for good behavior. 47 SR 978-80.

Guard Michael Grant dealt with Penry on a regular basis and testified that he and Penry were able to communicate, that Penry was able to understand prison rules, and that he observed Penry reading and writing. Grant noticed a change in Penry's behavior and

apparent abilities during the time that Penry's retardation was becoming a legal issue. 47 SR 965-68.

Guard Tim Keith had many conversations with Penry, and never had any trouble communicating with him. Keith had also seen Penry writing and looking at books in his cell. 47 SR 1003-04.

Frank Bragg, deputy sheriff of Trinity County, testified that he came to know Penry in 1979 and 1980. Bragg did not have problems communicating with Penry or understanding him. 47 SR 993-95. He also testified regarding one occasion during court proceedings on April 1, 1980, when Penry threw a large, heavy glass ashtray toward the district attorney and then lunged for the prosecutor. It took four officers to subdue Penry. 47 SR 997-1000.

Ellis I guard Sanders Estes talked to Penry on many occasions and testified that he could understand Penry and that Penry responded appropriately and appeared to understand him. Estes testified that he thought Penry could read and write. 47 SR 1157.

The State also introduced evidence of Penry's propensities for violence outside of prison. Jacalyn Howdeshell lived in Livingston, Texas, in 1979. She was barely acquainted with Penry because he had come into the restaurant where she worked and also helped her father do odd jobs. 47 SR 1010-11. On three occasions within a week of the instant capital murder, Penry upset Howdeshell by asking her to marry him. Penry said that she needed a man to protect her because there had been so many burglaries and rapes in the area. Howdeshell declined, and within a couple of days her home was broken into.[4] 47 SR 1014-

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[4] Penry referred to Howdeshell in one of his confessions: "If it had not been the chick I stabbed and killed, it would have been Jackie or some other chick, but, I don't think it would have been Jackie, because she wouldn't have fought me."; "Jackie is the one I had thought about raping." 47 SR 1038-41.

On July 25, 1977, Penry entered a guilty plea to the offense of rape in Cause No. 9886. He was sentenced to five years incarceration. 47 SR 1100-02. The victim of this rape, Diana Koch Reagan, testified to the facts of the offense. After work on February 16, 1977, Reagan drove to a department store in Livingston, but, before she could get out of the car, Penry got in the passenger side front seat. By making up a story about his brother being badly hurt in an accident on a nearby highway, Penry convinced Reagan that he needed her to take him there right away. Reagan got on the highway, but, when she noticed they were heading out of town, she told Penry she needed to go back and would have to let him out. When she tried to use her CB radio to ascertain the location of the "accident," she discovered that the wire to the microphone had been cut. At this point, Penry put a knife to Reagan's ribs, grabbed her hair, and told her to keep driving until he finally made her turn off onto a dirt road. After stopping, Penry raped her at knifepoint. 47 SR 1117-24, 1128-31.

The car got stuck after the assault, so Penry stopped a pickup truck, telling the occupants that he and his wife needed a ride. Reagan and Penry sat in the back.[5] When the truck stopped at a small grocery store, Reagan and Penry got out. Reagan began screaming, and Penry quickly told the truck's occupants that this was just how his wife behaved when she was having a tantrum. Reagan responded that she was not his wife but that he had kidnaped and raped her. By this point, one of the truck's occupants had pulled out a gun, and Penry then offered him several thousand dollars to forget the whole thing, but was refused.

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[5] There was a gun rack inside the cab of the truck, and Reagan did not want Penry in a position where he could reach the weapons. 47 SR 1134.

The police were summoned and arrested Penry. 47 SR 1132-38.[6]

In its case in chief, the defense presented evidence from a number of witnesses that Penry had been abused as a child by his mother. Many of these witnesses were impeached to some extent on cross-examination. For instance, though one of Penry's sisters (Sally Anderson) testified that Penry is mentally retarded and was severely abused, 48 SR 1082-91, she acknowledged that Penry's father was never aware of the abuse and that she herself had been convicted of burglary of a habitation. 48 SR 1100, 1104. Another sister (Trudy Ross) who testified to the mental retardation and abuse, 48 SR 1112-20, was impeached at length with prior testimony in which she had failed to discuss the extent of the abuse and in which she had testified that Penry had been violent and posed a behavior problem. 48 SR 1121-43. A brother (Jesse Penry) who testified to the retardation and abuse confirmed on cross-examination that he had himself been convicted of burglary of a habitation and also that Penry had physically hurt him when they were children. 48 SR 1153-55, 1160. An aunt (Patsy Ross) who testified to the retardation and abuse, admitted that Penry's mother took custody of Penry's little brother at one point after Penry attempted to have anal intercourse with the boy. She also recalled that Penry was arrested in Houston when he was seventeen years old for setting fire to an apartment complex. 48 SR 1216-26, 1228-30.

A psychologist who tested Penry, Dr. Randall Price, testified to his opinions that Penry was not faking on tests he had administered to Penry, 48 SR 1319-24, that Penry has a brain impairment resulting from generalized brain damage, 48 SR 1327, 49 SR 1448, 1497, that Penry is mildly mentally retarded, 48 SR 1331, 49 SR 1537-38, that the brain

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[6] During his confession to the instant capital murder, Penry's also confessed to the rape of Reagan. This portion of his confession was introduced at the punishment phase of trial, and was consistent with Reagan's testimony. 47 SR 1146-47.

impairment is a substantial cause of the mental retardation, 48 SR 1332, that brain impairment can cause problems in impulse control and judgment, 48 SR 1337-38, and that Penry's retardation and brain impairment are substantial factors in the development of his antisocial behavior. 49 SR 1511.

On cross-examination, Price acknowledged that he had strongly recommended that various tests be performed to substantiate his findings of brain damage, but that all those tests came back with normal results. These tests included: an electro-encephalogram ("EEG"); a magnetic resonance imaging ("MRI"); a positron emission test ("PET scan"); a "Tec scan" (an updated version of the "CAT scan"); and a screening for genetic syndromes that may lead to retardation. 49 SR 1500-07. Price acknowledged that various school and mental health records on Penry refer to his having committed various acts of arson, and his fighting with, and even setting fire to, other patients. 48 SR 1368-75. Though Price refused to diagnose Penry as having an antisocial personality, he acknowledged that the history is positive for antisocial behavior. 48 SR 1380-81. Price also acknowledged that Penry knows the difference between right and wrong, and would be a dangerous person in the free world. 49 SR 1451, 1485.

Additionally, school records, admitted as evidence of retardation, also reflected that Penry was referred to the Mexia State School as a child because the family was unable to control him in the home, and that he was described as a high temper child who bit, pinched, and choked other children. Records also noted that Penry was uncontrollable in the classroom, had failed first grade, and was taken out of special education classes his second year because his behavior could not be controlled. 49 SR 1574-75.

In rebuttal, the State introduced the testimony of a psychologist, Dr. Walter Quijano,

who testified that, while Penry's intellectual capacity is between mild retardation and borderline, Penry is not actually mentally retarded in light of his adaptive, day-to-day skills. Quijano further testified that Penry has the ability to reason and to learn, that Penry knows the difference between right and wrong, and that Penry does not have brain damage. 50 SR 1634-35, 1647-48. Quijano opined that Penry has an antisocial personality and is more likely to engage in continuing acts of violence. 50 SR 1649-50, 1654.

Another psychologist, Dr. Stanton Samenow, testified that Penry's IQ scores had underestimated his intelligence by not measuring his adaptive and social skills. Penry's ability to plan his prior crimes, think ahead, and think on his feet are examples of adaptive skills not taken into account. Samenow also noted that Penry is manipulative and has deliberately behaved differently in different circumstances. Thus, sometimes Penry would seek to avoid punishment through such things as threats to kill himself or claims that he had heard voices and seen things, while at other times he would become non-verbal and appear not to understand very much and attempt to use his mental retardation as an excuse for his actions. Samenow noted that Penry's criminal behavior expanded and intensified over the years and continued even in prison, and concluded that Penry was dangerous and that the prognosis for change is pretty bleak. 50 SR 1721-37.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Penry filed his federal habeas petition on March 2, 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the

AEDPA"). Accordingly, the AEDPA standard of review applies. *See (Terry) Williams v. Taylor*, 120 S. Ct. 1495, 1518 (2000) ("Because he filed his petition in December 1997, Williams' case is governed by the [habeas] statute as amended by AEDPA."); *(Michael) Williams v. Taylor*, 120 S. Ct. 1479, 1486 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Regarding claims which were presented to, and ruled on by, the state courts, the AEDPA limits the authority of federal courts to grant relief to state prisoners to the following:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In *(Terry) Williams v. Taylor*, Justice O'Connor delivered the opinion of the Court regarding interpretation of the AEDPA standard of review:

> Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under §2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

(Terry) Williams v. Taylor, 120 S. Ct. at 1522; *see also id.* at 1521 ("Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."). Here, for the reasons discussed below, and in light of the AEDPA standard of review, Penry fails

to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Penry's claims.

II. THE JURY POSSESSED AN ADEQUATE VEHICLE FOR CONSIDERATION OF PENRY'S PROFFERED MITIGATING EVIDENCE.

Penry first claims that the jury was unable to give mitigating effect to his evidence of mental retardation, brain damage, and child abuse through the instructions given at the punishment phase of trial. The question presented is not whether Penry is in fact mentally retarded or brain damaged; both were disputed issues at trial. Nor is the question presented whether Penry in fact suffered severe childhood abuse at the hands of his mother; also a disputed issue at trial. Rather, the question presented is whether the jury at Penry's trial possessed an adequate vehicle to give effect to the defense-favorable evidence presented on these subjects. Penry's jury had such a vehicle. On direct appeal, the Court of Criminal Appeals determined that the "nullification instruction" was sufficient to meet the requirements of *Penry I*. *Penry*, 903 S.W.2d at 765. As the following discussion demonstrates, such a conclusion was objectively reasonable and dictates the denial of relief as found by the lower courts. *Penry*, 215 F.3d at 508-09; *Penry v. Johnson*, No. H-97-4094, slip op. at 20-27 (S.D. Tex. Mar. 30, 1999).

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment-phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

(3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

5 Tr 1330-31. To make certain it complied with this Court's holding in *Penry I*, the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, *you are to consider mitigating circumstances*, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. *If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.*

5 Tr 1329 (emphasis added).

Initially, Penry's reliance upon *Roberts v. Louisiana*, 428 U.S. 325 (1976), for the

proposition that these instructions resulted in an arbitrary and capricious death sentence is entirely misplaced. In *Roberts*, this Court declared unconstitutional Louisiana's mandatory death sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S. at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* The Court found that the procedure "invite[d] the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is not appropriate," and thus injected into the sentencing determination an element of capriciousness forbidden by *Furman*. *Roberts*, 428 U.S. at 335. Louisiana's "implicit jury nullification" procedure did not pass constitutional muster because it skewed the "eligibility" decision encompassed in the jury's finding of guilt of first-degree murder, thus failing to adequately narrow the class of death-eligible defendants. *Id.* The punishment-phase instructions submitted at the end of a Texas capital murder trial cannot suffer the same defect because, under the Texas scheme, the constitutionally required narrowing at issue in *Roberts* takes place at the guilt-innocence phase.

To satisfy the requirements of the Eighth Amendment, a capital sentencing scheme must both (1) "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant v. Stephens*, 462 U.S. 862, 877 (1983), and (2) provide

for individualized consideration of the particular offender and offense. *Johnson v. Texas*, 509 U.S. 350, 360-61 (1993); *see also Barclay v. Florida*, 463 U.S. 939, 958 (1983). To find a defendant eligible for the death penalty in satisfaction of the first requirement, the jury must convict the defendant of murder and find one "aggravating circumstance" or its equivalent at either the guilt-innocence or punishment phase of trial. *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988); *Zant v. Stephens*, 462 U.S. at 878.

Under the Texas scheme, this constitutionally required narrowing function is performed by the penal statute defining the offense of capital murder, TEX. PENAL CODE ANN. § 19.03, which encompasses aggravating elements that distinguish capital murder from simple murder. *Jurek v. Texas*, 428 U.S. 262, 268-71 (1976) (opinion of Stevens, J., joined by Stewart and Powell, JJ.); *Lowenfield v. Phelps*, 484 U.S. at 243-46 (discussing narrowing function of Texas penal statute). It is at this stage that the procedure guards against arbitrary and capricious sentencing. Thus, where, as in Texas, this "eligibility" decision is performed at the guilt-innocence phase, further narrowing at the punishment phase is not required. *Lowenfield v. Phelps*, 484 U.S. at 246. The fact that the Texas sentencing jury must also answer special issues to impose the death penalty is not part of the constitutionally required narrowing process.

The Texas special issues, therefore, represent the second constitutional requirement, or the "selection" decision, where the jury determines whether a death-eligible defendant should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. at 879 (emphasis in *Zant*). This Court has also stressed that "complete jury discretion" is permissible at the "selection" phase.

See Buchanan v. Angelone, 522 U.S. 269, 275-76 (1998) ("our decisions suggest that complete jury discretion is constitutionally permissible" once a defendant has been found eligible for a death sentence); *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) ("the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found the defendant is a member of the class made eligible for the death penalty'") (internal citation omitted).

Accordingly, unlike the unitary procedure at issue in *Roberts*, Texas' bifurcated scheme insulates the eligibility and selection decisions from one another. Therefore, the punishment-phase instructions submitted at the end of a Texas capital murder trial cannot skew the eligibility decision made by the jury during the guilt-innocence phase. It is clear, then, that the jury's first verdict, in which it found Penry guilty of capital murder, fulfilled the constitutionally required narrowing at issue in *Roberts* and adequately safeguarded against an arbitrary and capricious sentence.

Additionally, the standard for claims such as Penry raises is whether there is a "reasonable likelihood" the jury interpreted the punishment-phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson*, 509 U.S. at 367 (*citing Boyde v. California*, 494 U.S. 370, 380 (1990)). The requirements of the Eighth Amendment are satisfied if the mitigating value of such evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S. at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place

at the trial.'" *Johnson*, 509 U.S. at 368 (*quoting Boyde*, 494 U.S. at 381).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence, nor did they require the jurors to violate their oaths in order to impose a life sentence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to use its findings in that regard to impose a life sentence, if warranted. It told the jury to simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. The jury was not told to disregard the law; it was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence ("reflected by a negative finding") if it found that such was appropriate. This directly satisfied the holding of *Penry I* that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Penry*, 492 U.S. at 320.

Penry's argument that the "reflected by" language of the charge required mitigating evidence to fall under the literal language of the special issues is simply an incorrect reading of the instruction and also directly contradicts his arguments that this was a nullification instruction. The instruction did not require mitigating evidence to fall under the literal language of the special issues, it merely informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of their initial answers to the questions.

In light of the language of the charge, there is no reasonable likelihood that the jury would have felt that it could not do that which the instructions specifically required. For the jury to believe that it would be violating the law to give effect to mitigating evidence in the

manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence which required it. *See Boyde*, 494 U.S. at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade")(citation omitted).

Further, the conduct of the attorneys supports the conclusion that Penry's mitigating evidence was within the jury's effective reach. At no time did the prosecution argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment-phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability should not be reduced for these reasons. *See, e.g.*, 51 SR 1854-63, 1941-45.[7] In closing argument, defense counsel succinctly summarized the instructions with no contradiction from the prosecution: "If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere." 51 SR 1903.[8] Again, where, as

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[7] During the initial group jury voir dire, the prosecutor had specifically told the venire that they could take mitigating evidence into consideration and, "if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty." 15 SR 186-87.

[8] Defense counsel argued more fully how the jury could give mitigating effect to Penry's evidence:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct

here, all the parties were operating on the same, permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence, there is no reasonable probability that the jury misinterpreted the instruction in the manner Penry asserts.

For all the above reasons, the lower courts' rejection of this claim under the AEDPA standard of review was entirely correct and reasonable. Accordingly, this claim does not warrant the granting of certiorari review.

III. THE STATE'S USE OF A DEFENSE-REQUESTED, COURT-ORDERED PSYCHIATRIC EXAMINATION TO REBUT PSYCHOLOGICAL EVIDENCE PRESENTED BY THE DEFENSE DID NOT VIOLATE THE FIFTH AMENDMENT.

In his final claim, Penry asserts that his Fifth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981), were violated by the State's punishment-phase use of a 1977 court-ordered psychiatric examination. As the following discussion demonstrates, however, the decisions of the lower courts were objectively reasonable under the AEDPA and dictate the denial of relief. *Penry*, 215 F.3d at 509-11 (also addressing additional Fifth and Sixth Amendment claims not raised in the instant petition); *Penry v. Johnson*, No. H-97-4094, slip op. at 47-60 (S.D. Tex. Mar. 30, 1999) (same); *Penry*, 903 S.W.2d at 757-60 (same).

Under *Estelle v. Smith*, a "capital defendant's Fifth Amendment right against compelled self-incrimination precludes the state from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he

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answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.

51 SR 1903.

has a right to remain silent and that anything he says can be used against him at a sentencing proceeding." *Powell v. Texas*, 492 U.S. 680, 681 (1989). As a corollary to *Estelle v. Smith*'s rule of exclusion, however, the Court has consistently recognized the State's right to use a court-ordered psychiatric examination to rebut psychological evidence introduced by the defense at trial. *See, e.g., Estelle v. Smith*, 451 U.S. at 472 (noting that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase"). Thus, "if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense." *Powell*, 492 U.S. at 684.

Further, the Court held in *Buchanan v. Kentucky*, 483 U.S. 402, 423 (1987), that the prosecution's use of a psychiatric report to rebut the psychological evidence and reports introduced by the defendant to establish his defense of "extreme emotional disturbance" was proper. The Court reasoned, "with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* Accordingly, just as a defendant who takes the witness stand waives his Fifth Amendment privilege and may be impeached with prior, unwarned statements,[9] a defendant who uses psychiatric evidence at trial waives his right to exclude otherwise inadmissible psychiatric evidence.

Penry's Fifth Amendment complaint presently before the Court concerns the admission of a 1977 report of an examination conducted of Penry by psychologist Felix Peebles in connection with a then pending charge of rape and which contained an opinion

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[9] *See, e.g., Harris v. New York*, 401 U.S. 222, 225-26 (1971).

that Penry would be a danger if released in the future. 49 SR 1510. The report was admitted during the cross-examination of one of Penry's punishment phase expert witnesses, Dr. Randall Price, as a business record *and something Dr. Price had relied upon in reaching his opinions in this case*. 49 SR 1404-06, 1429-31. Penry's argument that the admission of the Peebles report violated his Fifth Amendment protections rests largely upon Penry's blanket assertion that the examination was compelled because it was court ordered in 1977. However, Penry's attorney on that prior charge testified unequivocally at a hearing during the instant trial that the examination was ordered at defense counsel's request. 47 SR 1058. Thus, the Court of Criminal Appeals reasonably held that the Fifth Amendment was not implicated because Dr. Peebles was acting as a defense agent, not as a state agent conducting a custodial interrogation. *Penry*, 903 S.W.2d at 759-60 ("at the time appellant made his statements, he was not confronted with someone who was essentially an agent of the state") (internal citation and quotes omitted); *see also Estelle v. Smith*, 451 U.S. at 467 (stressing that the defendant in that case did not initiate the psychiatric evaluation which was used against him and was not examined by someone acting solely in his interest); *Buchanan*, 483 U.S. at 422-23 ("if a defendant requests [the psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.").

Additionally, the State permissibly used the results of a number of prior psychiatric examinations, including the 1977 evaluation, to counter psychological evidence introduced by the defense at both phases of the trial. For instance, at the guilt-innocence phase, the

defense introduced selected portions of Penry's mental health records. 45 SR 674-77. Those selected by Penry reflected his low scores on intelligence tests as well as the examiners' impressions that Penry was doing his best and trying to please. 45 SR 678-92. This evidence, if credited, supported the defensive theories that Penry lacked the mental capacity to knowingly and intelligently waive his *Miranda*[10] rights, that Penry falsely confessed in order to please the authority figures represented by law enforcement officers, and that Penry was incapable of acting with criminal intent. *See* 46 SR 893-99 (urging these theories during guilt-innocence phase summation); *see also* 51 SR 1909 (arguing in punishment phase summation that Penry's admission in his confession that he knew beforehand that he was going to have to kill the victim was false because mentally retarded people such as Penry want to appear smart and do not want to admit they have acted rashly).

The Peebles report (admitted at the punishment phase) reinforced the State's rebuttal testimony of Dr. Fred Fason at the guilt-innocence phase that, despite Penry's below normal scores on intelligence tests, Penry's intellect and adaptive skills rendered him capable of understanding and waiving his *Miranda* rights and capable of correctly relating the facts set forth in his confessions. 46 SR 766-68, 787-88. It further supported Dr. Fason's testimony that Penry had an antisocial personality, a factor which Fason testified could explain Penry's low scores on intelligence tests and also indicative that Penry was unlikely to confess out of a desire to please authority figures. 46 SR 790-91, 796-805.

The report similarly rebutted Penry's mitigation arguments at the punishment phase. Again, in response to the defense evidence that Penry was truly as mentally retarded as his test scores indicated, the report supported the testimony of the State's experts that Penry was

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[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

actually malingering regarding his mental abilities. 50 SR 1728-29 (Dr. Samenow testifying that Penry would use mental retardation as an excuse for his behavior); *see also* 50 SR 1644 (Dr. Quijano testifying that the presence of an antisocial personality disorder is a factor in the analysis of whether someone is malingering).

Additionally, using anecdotal evidence and the expert testimony of Dr. Price, a clinical and neuro-psychologist who based his opinions in part on an eleven hour examination of Penry, the defense sought in the punishment phase to persuade the jury that Penry's violence was attributable to childhood abuse and mental retardation or brain impairment. For example, Dr. Price testified that "brain impairment of this type, causes the person problems in areas such as . . . impulse control, . . . tolerance, it decreases that. It affects their judgment and their ability to reason." 48 SR 1331-38. In rebuttal, the State presented evidence, including the Peebles report and expert testimony, that Penry's violence was attributable to his antisocial personality rather than to childhood abuse and mental retardation, if any. The prosecutor made this point in his cross-examination of Dr. Price:

> Prosecutor: [Y]ou are telling this jury that he is mentally retarded . . . and that, that could be a contributing cause to the criminal acts, is that right?
>
> Price: In so many words.
>
> Prosecutor: Is that what you told this jury on direct examination?
>
> Price: That, it influences that he has engaged in criminal activities?
>
> Prosecutor: Psycho-path also, does the same thing, doesn't it, Doctor?
>
> Price: Certainly.

48 SR 1359-60. Dr. Price summarized his opinion by testifying that Penry "looks more like

people with brain damage that I have seen than those with anti-social personality." 48 SR 1381. He added, "I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry." 49 SR 1511. The State's experts, however, testified that Penry's violence was more attributable to his antisocial personality than to any mental retardation. *See, e.g.*, 50 SR 1624, 1648-52 (Dr. Quijano testifying that incidents of violence are not higher among the mentally retarded); 50 SR 1732-33 (Dr. Samenow testifying that "Penry was a person who really, simply made a series of choices over time not to live within the . . . norm and standards of society," and that this was consistent with an antisocial personality disorder but probably inconsistent with mental retardation).

In light of the many issues raised by the defense to which the report was useful rebuttal, Penry has failed to demonstrate that the report's use by the prosecution violated the Fifth Amendment. In any event, the lower courts' conclusions that no Fifth Amendment violation occurred was at least reasonable under the AEDPA.

Finally, even where such error occurs, federal habeas relief is not warranted unless the error had a "substantial and injurious" effect on the verdict under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Here, given that Penry's own expert relied upon the 1977 evaluation, given Penry's extensive acts of violence in and out of prison (including the brutal nature of the instant offense), given that none of the State's experts relied to any significant extent upon the 1977 evaluation for their opinions, given the testimony from four prison guards that they believed Penry would be a future danger, and given the inculpatory and remorseless statements in his confessions, the jury's verdict cannot be said to have been affected by admission of the Peebles report, even if it was erroneously admitted.

IV. PENRY HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

Penry is not entitled to relief on his application for stay of execution. In deciding whether to grant a stay, the Court is guided by the following standard:

> [T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983) (citations omitted). Because it is clear that the lower courts correctly resolved the issues presented and that their resolution only involved the application of well-established precedent to the facts of this case, it is highly improbable that certiorari will be granted, much less that the decision below will be reversed. Penry thus cannot satisfy the standard for obtaining a stay.[11]

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Penry's petition for writ of certiorari and application for stay of execution be denied.

Respectfully submitted,

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[11] Penry previously raised both of the issues presently before the Court in his petition for writ of certiorari to the Court of Criminal Appeals on direct appeal. Additionally, in his application for stay, Penry included a third claim: namely, that *his* evidence of mental retardation, brain damage, and severe childhood abuse, rendered him constitutionally ineligible for the death penalty under the Eighth Amendment. Such a claim was not raised in the petition, and Penry subsequently filed a corrected application for stay deleting reference to this third claim. Accordingly, this claim is not addressed herein.

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